

1 NOTE: The case is called to be heard at 10:52 a.m.
2 as follows:

3 THE CLERK: BMG Rights Management (US) LLC, et al.
4 versus Cox Enterprises, Inc., et al., civil action number
5 14-cv-1611.

6 MR. KELLEY: Good morning, Your Honor. Walter Kelley
7 on behalf of plaintiffs. With me are John Caracappa and Paul
8 Gennari. Mr. Caracappa is going to argue.

9 THE COURT: Okay.

10 MR. REILLY: Good morning, Your Honor. Craig Reilly
11 for the Cox defendants, together with my co-counsel Brian
12 Buckley. And then from Cox itself, Stephanie Allen-Wang.

13 THE COURT: Okay. And who is going to argue, Mr.
14 Reilly?

15 MR. REILLY: Mr. Buckley will, Your Honor.

16 THE COURT: Okay. Well, Mr. Buckley, let me first,
17 before we get into the argument phase, I hope you brought to
18 Ms. Frazier's attention my order that she not be telling people
19 to send me letters.

20 MR. BUCKLEY: Absolutely, Your Honor. As soon as we
21 got your order, it was communicated to Cox. Is that what you
22 mean, to the client?

23 THE COURT: Yes.

24 MR. BUCKLEY: Yes, absolutely.

25 THE COURT: I mean, you know, you say you're not

1 providing people with legal advice, and then your provide them
2 with bad legal advice. That is, you say: We can't provide you
3 with any legal advice, but you should send letters to the
4 magistrate judge involved in the case. That's bad legal
5 advice.

6 And, you know, you need to make sure that I don't
7 start getting any more letters from any of your customers
8 having been referred to send me letters from someone in the
9 legal department at Cox. Is that clear?

10 MR. BUCKLEY: It's very clear, Your Honor. I
11 apologize for that. It was part of what I had hoped at the
12 last hearing to clarify what the process was going to be, and
13 we made a mistake. And I apologize.

14 THE COURT: Well, you know, the Clerk of the Court,
15 file it with the court, something like that. But the idea that
16 you're suggesting to someone that they mail letters to a
17 judicial officer, isn't the way things are done in the Eastern
18 District of Virginia.

19 MR. BUCKLEY: And we apologize, Your Honor.

20 THE COURT: It may be done differently in Atlanta or
21 something like, but, you know, you've got to know the ball
22 field you're playing in, and -- okay.

23 Well, we've got a number of different motions. I
24 think the -- I will take them up in a little bit different
25 order than they were filed in because I think it may be easier

1 to just get through a couple of them, and then deal with the
2 others.

3 The motion to compel Rightscorp. My understanding is
4 that with a representation that all of the Steele documents
5 have been produced, the only issue there has to do with the
6 source code, is that -- am I correct on that?

7 MR. BUCKLEY: With the caveat, Your Honor, that we
8 just want to understand that we've received all of the
9 responsive Steele documents. And with that understanding, or
10 at least with that certification from plaintiffs, that should
11 be a nonissue.

12 THE COURT: All right. Well, on the source code
13 issue -- and you saw in their opposition they're talking
14 about -- well, you know, talking about all code that relates to
15 particular functions that are done, is not really realistic.

16 I mean, there are certain areas in which you've
17 outlined where, you know, certain components can be identified.
18 And I think you pointed out one that they may have
19 misidentified. And they said, here it is, and you looked and
20 found out that it was there.

21 But my concern has to do with the way that you've --
22 you know, all code that connects to, reads, or so-and-so that
23 does such and such, all code that does so and so, as opposed
24 to, you know, what is the source code for a particular routine
25 or something like that.

1 And I think you understand the position they're in.
2 And that if I order them to produce all the code and there is
3 an extraneous piece of code that goes from, you know, one
4 routine to another that then goes to another routine, that that
5 code is related to an execution.

6 So, I mean, I understand your need to want to make
7 sure that you've got all the source code, but I'm also
8 concerned about the way that you have this worded as to all
9 code relating to certain things.

10 So help me figure out a way to get you what you want
11 but not put them in a jam by doing that.

12 MR. BUCKLEY: Your Honor, and that's fair. And this
13 is not intended to be a gotcha exercise so we can say later,
14 oh, you were told to give us every line of code and you failed
15 to do that.

16 It really is an attempt to understand what we've
17 already received and to get an unequivocal statement that the
18 specific things we've asked for have been produced, which we
19 have not been able to get. So that's really the bigger issue.

20 If we could get a statement based on somebody with
21 knowledge, like if it's Mr. Boswell, fine. What we need is a
22 statement that the things that we've identified have been
23 produced. And if they have, then there's nothing more to argue
24 about.

25 The issue we've had is that we've had -- we've been

1 given that representation before and it's turned out not to be
2 true. So some of the things we've identified are specific
3 files. They were able to respond on a couple of them and say,
4 oh, it's named something else. So on those, that should be
5 easy.

6 On the other, and particularly the categories that
7 you're focussed on, Your Honor, where it says all the code that
8 relates to a particular function, obviously our experts are
9 going to look at that code, they are looking at that code. If
10 we get a representation from the plaintiffs based on somebody
11 who knows that the code related to those functions has been
12 produced, then I don't think there is anything left to argue
13 about.

14 THE COURT: Okay. All right. Let me hear from the
15 plaintiffs on this. First as to the Steele documents.

16 MR. CARACAPPA: Yes, Your Honor. I can represent
17 that after a reasonable search, to the best of my knowledge,
18 all of those Steele documents have been produced.

19 THE COURT: Well, I want to understand what
20 reasonable is and based on your knowledge. Is this somebody
21 saying, I think I've done it all? Or is this somebody -- I
22 mean, I want a representation, not a somebody told me
23 something.

24 And, you know, we're not going to be playing games in
25 this case. And, you know, either you're going to represent

1 that they've been all produced or you're going to represent --
2 or you're not going to represent it.

3 So you're the person who's here to respond to this
4 motion. You're the one who's charged with doing what you need
5 to do on behalf of your clients.

6 So the question is, have all of the nonprivileged
7 documents that were discussed in the Steele deposition, have
8 they been produced?

9 MR. CARACAPPA: All the documents that were discussed
10 in the Steele deposition that Cox asked for that are the
11 subject of this motion have been produced, yes.

12 THE COURT: Okay. Okay. What about the source code?

13 MR. CARACAPPA: With respect to the source code, I
14 think it's an unfair representation that we have not been
15 producing the code or we have produced it piecemeal.

16 We made it available for inspection months ago. And
17 there have been times where Cox has said to us, we can't find
18 File X or File Y or File Z. In some of those instances we
19 said, it's named something else, here it is.

20 In others of those -- in other instances we've said,
21 okay, we'll produce that module because we have not yet
22 produced it.

23 So when Cox came to us with this list, we need
24 confirmation that all these things have been produced, we said,
25 our client is on vacation, they get back on Friday, we will

1 confirm with them on Friday that all of this has been produced.
2 If it hasn't, we will produce it.

3 It has been our procedure that as soon as we find out
4 something is not produced, we produce it within two days, three
5 at the most. And that's exactly what we plan to do here. We
6 have a call scheduled with the client today to either confirm
7 to Cox that all this code has been produced. Or if it hasn't,
8 to produce the module.

9 Cox wanted the representation last week. Our client
10 was on vacation, so we spoke to our expert. And our expert
11 said, it seems to all be here. So that's the representation we
12 gave him, with the caveat that we have to speak to the client
13 on Friday to confirm.

14 THE COURT: All right. Well, I want you to speak to
15 the client today. Make a representation. And if the
16 representation is, we have to produce additional material, I
17 want it done by 5 o'clock on Tuesday.

18 MR. CARACAPPA: Yes, Your Honor.

19 THE COURT: Okay. So, you know, talk to the client.
20 Get back to them. If there is anything else that needs to be
21 produced, it needs to be produced by 5 o'clock on Tuesday.

22 MR. CARACAPPA: Okay, Your Honor. Thank you.

23 THE COURT: Okay.

24 MR. CARACAPPA: Yes.

25 THE COURT: All right. So that should take care of

1 that one.

2 Now, the motion to compel as to the plaintiffs.
3 Let's take it up with the documents relating to communications
4 and the relationships with Rightscorp.

5 What remains at issue in that part of this motion?

6 MR. BUCKLEY: So to be clear, we're not asking them
7 to scorch the earth. What we were told on the 18th when we
8 conferred was that there are documents in plaintiffs'
9 possession that relate in some way to Rightscorp. They were
10 collected, they were reviewed, and then the plaintiffs went
11 through and cherry-picked what they were going to provide to
12 us. And as we understand it, that cherry-picking was documents
13 that relate to Rightscorp generally, and I don't know what
14 means exactly, and documents that relate to Rightscorp with
15 respect to Cox.

16 What we said was, we're entitled to see what you have
17 that relates to Rightscorp. And if that's documents, for
18 example, that relate to Rightscorp vis-à-vis some other ISP,
19 not Cox, that is certainly discoverable and I think potentially
20 highly relevant, the relationships between plaintiffs and
21 Rightscorp, and not just Cox, but other ISPs.

22 And so, all we've asked for is whatever is not
23 privileged, give us the Rightscorp information that you already
24 collected. And so far they have declined to do that.

25 THE COURT: Let's deal with that issue, and then I'll

1 deal with the financial information.

2 MR. CARACAPPA: Thank you, Your Honor.

3 So Rightscorp has produced all -- sorry. Copyright
4 holders have produced all documents generally related to
5 Rightscorp. And what that means is, if copyright holders had a
6 correspondence or a conversation with Rightscorp about, for
7 example, how does your software work, how do you figure out how
8 people infringe on the network, all of that stuff has been
9 produced.

10 If copyright holders have corresponded with
11 Rightscorp regarding Cox, all of that has been produced.

12 Documents that have been withheld are documents --

13 THE COURT: Why would you -- well, why would you
14 necessarily have documents relating to correspondence between
15 copyright holders and Rightscorp? That's what you just said
16 you produced, right?

17 MR. CARACAPPA: Yes. Well, Rightscorp has
18 correspondence related to the copyright holders. Right?

19 THE COURT: Right, right.

20 MR. CARACAPPA: So the copyright holders may ask
21 Rightscorp, what do you do, how do these -- how did these
22 things work? All of that has been produced.

23 THE COURT: And all of that is in the possession of
24 the plaintiffs?

25 MR. CARACAPPA: It's either been produced as it

1 exists in the possession of the plaintiffs, or as it existed in
2 the possession of Rightscorp. So it has been produced by one
3 of those entities.

4 THE COURT: All right. Well, I mean, the motion to
5 compel that I'm dealing with right now is a motion to compel
6 against the plaintiffs.

7 MR. CARACAPPA: Yes.

8 THE COURT: So I need to understand what the issue is
9 far as the documents that are in the possession, custody, or
10 control of the plaintiffs that would be responsive to the
11 document requests that have been served.

12 And, you know, honestly, the responses, the written
13 responses that you provide don't really give the impression
14 that you're withholding anything other than privileged
15 information. And it sounds like you're parsing out more than
16 just privileged information in your responses to the documents
17 that you've provided, is that right?

18 MR. CARACAPPA: Yes, Your Honor. The documents that
19 we have related to non-Cox ISPs -- or non-Cox Internet service
20 providers, Verizon, for example, that stuff is not relevant.
21 And we objected on the grounds of relevance.

22 And during the meet and confer process it came out
23 that we were withholding it, and we weren't hiding it, but they
24 asked us, what are you withholding? We said, these are the
25 things we're withholding as not being relevant. Cox seems to

1 disagree.

2 We don't understand the relevance of that
3 information. If they're asking us to produce the notice
4 letters, for example --

5 THE COURT: Well, why would Cox have -- and this is
6 where I got confused. Okay. And talking about your clients,
7 and I guess -- I'm talking about the plaintiffs, not just your
8 clients, because I guess you're also representing Rightscorp.
9 But this document request goes to the plaintiffs.

10 MR. CARACAPPA: Yes.

11 THE COURT: Why would your plaintiffs necessarily
12 have information that is between Rightscorp and other entities
13 other than you?

14 MR. CARACAPPA: They would -- they would have
15 information as between Rightscorp and other ISPs. So my client
16 works with Rightscorp to address infringers not just on the Cox
17 network, but on other networks.

18 THE COURT: Right. But the infringers -- so anything
19 that Rightscorp gets, they send to you, typically?

20 MR. CARACAPPA: Not -- I don't know the answer to
21 that question. I don't think that's necessarily true, not
22 everything, no.

23 THE COURT: Why isn't your clients' relationship with
24 other Internet service providers at least relevant to the
25 issues involved in this case?

1 MR. CARACAPPA: We don't feel that Cox has been able
2 to explain how. What's relevant to the issue in this case is
3 Cox and the infringement on its network. We don't understand
4 how the infringement on other networks is relevant.

5 In addition, we're not quite sure exactly what Cox
6 wants us to produce. They want us to produce the notice
7 letters we've sent to other people on non-Cox networks? We're
8 not quite sure how that's relevant, and it would involve
9 producing millions of other notice letters.

10 So we're trying to understand how the additional
11 information they need they think is relevant. And the only
12 thing they can say is, well, it's relevant to the agency
13 relationship.

14 And, one, we don't necessarily think it is relevant
15 to the agency relationship. But even if it is, we're not sure
16 how the agency relationship is relevant to any of the issues in
17 the case.

18 THE COURT: Well, certainly the agency relationship
19 -- your having them act on your behalf by sending these
20 notices, right? I mean, so the agency relationship has to be
21 at least relevant or a part of this case.

22 MR. CARACAPPA: And let me rephrase. We think the
23 documents we've produced already establish that.

24 THE COURT: Establish it, right. I understand that
25 part.

1 MR. CARACAPPA: Okay.

2 THE COURT: All right. All right, well, let me go
3 back and hear from the defendant as to the relevancy other -- I
4 mean, other than relationships with other ISPs --

5 MR. BUCKLEY: Right, Your Honor. So there -- I'm
6 sorry.

7 THE COURT: And I'm, you know -- I think some broad
8 information as to maybe relevancy, or who they deal with other
9 ISPs, but every single notice letter that was sent to Verizon,
10 I mean --

11 MR. BUCKLEY: We do not want that information, Your
12 Honor. This is not relationships with other ISPs. The issue
13 is relationships between plaintiffs, which Mr. Caracappa refers
14 to as copyright holders, which sometimes muddies things,
15 plaintiffs, and Rightscorp.

16 So we have gotten part of that universe of documents,
17 but there is another part of that universe, which is
18 relationships between plaintiffs and Rightscorp that are not
19 specific to Cox. And the question is how could that
20 potentially be relevant. Let me give you one example.

21 So we believe -- and this is me talking and this is
22 the way that we view the case, but we believe and the evidence
23 I think is going to show that plaintiffs and Rightscorp picked
24 Cox as their target for this lawsuit. And it's possible that
25 they were careful about their communications, plaintiffs and

1 Rightscorp, so that they didn't prejudice their claims in this
2 lawsuit or there wasn't something discoverable in this lawsuit
3 that they didn't want out there. They may not have been as
4 careful with respect to say Verizon.

5 So maybe there is an agreement between plaintiffs and
6 Rightscorp that relates to Verizon that says something very
7 different than what they're saying in this suit. Maybe there
8 are communications between plaintiffs and Rightscorp about
9 Verizon that undermine what they're saying in this lawsuit. We
10 don't know.

11 What we do know is there is a universe of a documents
12 that are not privileged that relate directly to the
13 relationship between plaintiffs and Rightscorp, which is at the
14 heart of this lawsuit as Your Honor just observed, and that we
15 have not been provided.

16 I think what -- and relevance isn't the standard.
17 Discoverability is the standard. And I think absolutely that
18 information is discoverable. Whether it ultimately ends up
19 being relevant or part of the case is not the issue.

20 THE COURT: So -- all right. Go back and help me
21 understand, whatever the relationship that the plaintiffs may
22 have with Rightscorp as to Verizon --

23 MR. BUCKLEY: Right.

24 THE COURT: How does that bear on the claims that the
25 plaintiffs are bringing against Cox in this case?

1 MR. BUCKLEY: So plaintiffs' theory is that when they
2 send notices to Cox -- when Rightscorp sends notice to Cox that
3 include settlement language, we have an obligation to forward
4 those notices to our subscribers. And if we don't do that,
5 we're guilty of contributory infringement.

6 And when we went back to Rightscorp and said, we're
7 happy to forward proper notices, just remove the settlement
8 language, they refused.

9 What if, for example, their relation -- Rightscorp
10 and plaintiffs' relationship with Verizon is very different?
11 What if they send a different kind of notice to Verizon? Or
12 what if they sent settlement notices to Verizon and when
13 Verizon pushed back, Rightscorp said, okay, we'll change the
14 notice, we'll fix the language?

15 I think that would be probative. I think Your Honor
16 might be interested in knowing that, so might the jury be
17 interested in knowing that.

18 THE COURT: It's still what your obligations are,
19 right? I mean, are you required to do it or aren't you
20 required to do it under the law? And they don't have to treat
21 every single customer the exact -- or every single entity the
22 exact same way.

23 MR. BUCKLEY: And that may be true as a legal matter,
24 Your Honor, but that doesn't mean that this information isn't
25 potentially probative and isn't discoverable.

1 And it may also be that the agency relationship
2 between plaintiffs and Rightscorp as it relates to Cox is
3 unique in some way. And I think we're entitled --

4 THE COURT: And so --

5 MR. BUCKLEY: -- to explore that.

6 THE COURT: But again, so what if it is unique? I
7 mean, how does that, when push comes to shove, how does that
8 bear on anything that has to do with a claim or defense in this
9 case?

10 MR. BUCKLEY: So if --

11 THE COURT: As long as there is a relationship, and
12 it's a valid relationship, and they have agency, and they are
13 doing things that are within the realm of the law, if they do
14 something differently against another entity, I'm not sure how
15 that has any bearing on a claim or defense in this case.

16 MR. BUCKLEY: Your Honor, respectfully, if the
17 plaintiffs and Rightscorp picked Cox out as a target and their
18 -- and essentially set Cox up for this lawsuit. Right?
19 They've been sending notices into a black box for three years
20 and waiting to suit. If they are treating other ISPs
21 differently, if they are telling other ISPs you actually don't
22 have an obligation to forward a notice that looks like this, or
23 you're not liable for contributory infringement just because
24 somebody on your network might be infringing -- whether that is
25 ultimately determinative on the legal issue is not, in my view

1 -- that is not the issue here. And it certainly, I believe,
2 certainly would be probative and certainly be interesting to a
3 jury if Cox was set up, essentially, for this lawsuit in a way
4 that other ISPs have not.

5 And plaintiffs are large organizations, lots of
6 copyrights, and for some reason they chose Cox and they handled
7 Cox in a particular way and the notices to Cox in a particular
8 way. We're entitled to explore that.

9 And it may be ultimately that the relationship with
10 Verizon isn't relevant, and maybe none of that comes in at
11 trial, but we don't know. Until we see what those documents
12 are, and they have been collected, they are sitting there, easy
13 to produce, until we see them, we won't know whether they are
14 relevant or not.

15 THE COURT: Well, sitting there and easy to produce
16 are two different things.

17 MR. BUCKLEY: Fair enough. I don't mean to be glib
18 about that. Production takes time. But the point is, they've
19 been collected and then were cherry-picked. Plaintiffs decided
20 unilaterally what was interesting to us, what was relevant to
21 us, what we were entitled to see. And there is a set of
22 documents sitting there that they collected and decided weren't
23 relevant. And I think that's a determination for Cox to make
24 or for Your Honor to make, but we haven't seen the documents.

25 THE COURT: Okay. What -- all right, let me go back

1 and hear from the plaintiff.

2 What documents haven't you produced that relate to
3 your relationship with Rightscorp?

4 MR. CARACAPPA: Sure, Your Honor. Let me just make
5 one point before I answer that question.

6 I think they don't have the standard quite correct.
7 They still have to prove relevance. They can't just ask for
8 documents and look at them and say, well, I'll look at them and
9 then argue relevance later.

10 They don't have to necessarily prove admissibility,
11 but they certainly have to prove to the Court that the
12 information --

13 THE COURT: Well, if you wrote Verizon and told
14 Verizon, this is not contributory copyright infringement,
15 that's an admission, right? You don't need to send these
16 notices, we don't believe it's contributory copyright
17 infringement, but we really wish you would.

18 MR. CARACAPPA: Well, to be clear, we told Cox in the
19 notice letters that they don't have an obligation to forward
20 these settlement offers on to their customers.

21 So, again, as Your Honor pointed out, we don't think
22 any correspondence with Verizon or Comcast relate to Cox's
23 liability for what Cox is doing in this case and pursuant to
24 the law. What other people do or what we do with other people
25 is entirely irrelevant.

1 Now, to your --

2 THE COURT: Not if you've made admissions to them
3 that are different than the claims you're making here. I mean,
4 if you have indicated to them, we do not believe X and we will
5 not pursue a claim for X, and then you turn around and you do
6 that here, that would be relevant, wouldn't it?

7 MR. CARACAPPA: Arguably, yes, that would be
8 relevant. I am not aware of any documents like that in this
9 case.

10 THE COURT: Well, no, I'm sure you're not, but --
11 well, tell me, tell me what we're talking about as far as --
12 and we're not talking about the notices that were sent or
13 things like that.

14 What do we have -- what do you have that relates to
15 the relationship between the plaintiff here and Rightscorp that
16 you've withheld -- I guess it has to do with Verizon and
17 Comcast?

18 MR. CARACAPPA: Discussions about Verizon and
19 Comcast, for example, yes. And the notice letters --

20 THE COURT: Well, the notice --

21 MR. CARACAPPA: -- that relate to other people.

22 THE COURT: Right.

23 MR. CARACAPPA: So outside that, discussions as they
24 relate to Verizon and Comcast, for example. So non-Cox ISPs.
25 I don't know standing here today the universe of those

1 documents.

2 THE COURT: Well, you know, I'm persuaded now I think
3 by the defendants' argument that they do have -- certainly not
4 the notice letters, and I don't think you want to produce them
5 or they want to get them. But I do think, given the nature of
6 the case at this stage in the discovery, I can't say that it
7 wouldn't be discoverable information.

8 So I am going to require you provide the other
9 documents relating to the relationship between Rightscorp and
10 the plaintiffs that are not solely related to Cox to be
11 produced.

12 The other -- I guess so now let's get to the other
13 one that I thought was going to be the more difficult one. I
14 thought that one was going to be fairly easy.

15 But this one, the financial information, I take it
16 that the defendants' argument there is that actual damages are
17 a factor that come into play in making a determination as to
18 where in the range of statutory damages the amount should be
19 set, is that basically it?

20 MR. BUCKLEY: Yeah, that's exactly right, Your Honor.
21 That's exact right.

22 THE COURT: And what is it that you have now and what
23 is it that you think that you would need in order to get --
24 and, you know, we're not talking about down to the last penny
25 kind of thing.

1 MR. BUCKLEY: Right.

2 THE COURT: We have to talk about the practical
3 aspects of, you know, what really -- what would your expert
4 need in order to come up with some information as opposed to
5 each and every invoice as to profit, loss, overheard, those
6 kinds of things.

7 MR. BUCKLEY: No, we don't. You're right, Your
8 Honor, we don't want or need that sort -- that granular level
9 of detail.

10 What we've been provided so far, however, is for BMG
11 top level revenue associated with particular copyrighted works
12 and not even the entire universe of works that are being
13 asserted in the case.

14 And for Round Hill, similarly a top line revenue
15 number for each work, not all the works, and for Round Hill not
16 even broken down by year. So just work and dollar amount.

17 It was -- they are not business records. They were
18 prepared for the purposes of this litigation. It's not
19 information that is kept in the ordinary course. So we
20 actually have no, no business record financial information at
21 all.

22 And I think it's probably obvious that a top line
23 revenue number tells you nothing about profit. It doesn't --
24 and you can't break it down. There are different ways they
25 earn income from each of these works.

1 So we've actually said specifically, and we've told
2 them in correspondence, and it's also in our motion, what our
3 experts need. And it's at page 4 of our motion, Your Honor.
4 But we need information by distribution channel.

5 So income derived from, for example, income derived
6 from physical album sales, digital downloads, streaming
7 royalties, licensing royalties. So we can break out how the
8 revenue for each work. You know, what comprises revenue for
9 each work. Revenues per channel --

10 THE COURT: Why is that necessarily needed? I mean,
11 I take it because you're going to try and focus on the
12 downloading revenue and see how that was impacted, or what?

13 MR. BUCKLEY: Right. And I am certainly not a
14 financial expert, Your Honor, and some of this is, obviously,
15 information that I'm passing on that our expert is saying he
16 needs to do an actual damages analysis. So I want to make
17 clear that on some of these I'm not the person to answer the
18 specifics.

19 But in general our -- we should be able to do our own
20 analysis of had plaintiffs chosen to pursue an actual damages
21 theory, what would it have shown. Because the actual damages
22 inform the statutory damages issue. It's not the only issue
23 and it doesn't have to be a one-to-one ratio, but it's one of
24 the elements.

25 So to get to actual damages, you're talking about

1 lost profits potentially. So what is the profit that is lost
2 for a copyrighted work when a subscriber out in the universe
3 downloads it as opposed to buying it in the store. And this is
4 just one example.

5 But to get to that, you've got to understand how is
6 the revenue that is associated with that work, how does it
7 break down? If part of it is physical album sales, that might
8 be relevant. But if part of it is -- and part of it is
9 streaming, that might be relevant.

10 But if part of it is licensing royalties, for
11 example, that might be totally irrelevant to determining
12 whether there was profit lost.

13 Until you have that breakdown, there is no way to
14 tell. All we've got right now is a dollar figure per work.

15 THE COURT: But if you get that information --

16 MR. BUCKLEY: Yes.

17 THE COURT: How do you -- how does that translate
18 to -- somebody downloaded some material inappropriately. How
19 is anybody then going to know whether if that hadn't been done,
20 would that person have downloaded it? Would they have gone to
21 the record store and bought a CD? Would they have not done
22 anything?

23 I mean, that's the part I don't understand how
24 breaking all this channel information necessarily translates
25 into something that you necessarily need in order to figure out

1 your lost profit analysis.

2 MR. BUCKLEY: So two responses to that, Your Honor.
3 One is, I think the first point you made is more of a causation
4 issue. Even if you could figure out what component of a
5 particular work, what value of that is related to downloads,
6 how do you then connect the dots and say because Brian Buckley
7 illegally downloaded this, I lost this dollar amount. That's a
8 causation issue.

9 In terms of specifically how do each of these things
10 relate to a calculation of actual damages, honestly, my expert
11 is going to tell me that. I can't do it. But our expert is
12 saying, I can't get to an actual damages number, whether it
13 ends up being relevant or not, unless I have more information.

14 THE COURT: Okay.

15 MR. BUCKLEY: And, Your Honor, I don't think the case
16 law is --

17 THE COURT: What's the time period that you're
18 looking for for that information?

19 MR. BUCKLEY: Three years prior to the lawsuit being
20 filed. So it was November of 2014. So we would go back three
21 years from that date.

22 THE COURT: All right. Let me hear from the
23 plaintiffs.

24 I know that's why you chose statutory damages,
25 because you didn't want to have to go through and do all the

1 stuff trying to calculate actual damages, but --

2 MR. CARACAPPA: And because, as Your Honor noted,
3 based on the financials alone, no one is sure how they are
4 going to do it. Because once you illegally download or upload
5 or make available for download or upload a piece of music, it
6 affects every area of distribution. Because you don't just
7 have the people that are uploading and downloading it, but it
8 expands, and they make it available. And you could lose not
9 only Internet sales, but you could lose streaming and record
10 sales.

11 So there isn't any way for anybody to take these
12 financials and come up with an actual damages number.

13 I do have, to the extent the Court is interested,
14 what we have produced to Cox. Does the Court want to take a
15 look at those?

16 THE COURT: Well, just explain it to me so that I
17 know what it is.

18 MR. CARACAPPA: Okay. So what did is we have the
19 song, we have the year, and we have the income generated from
20 that song. It's my understanding it's for every copyrighted
21 issue. If it's not, then we can go back and provide that
22 information for every copyright at issue.

23 THE COURT: For both BMG and Round Hill? I mean,
24 he's indicated that for Round Hill it's not broken down by
25 year.

1 MR. CARACAPPA: That's correct, for Round Hill it is
2 not broke down by year, and we can go back and do that.

3 THE COURT: But it's only revenue, not -- it only
4 shows the revenue per work?

5 MR. CARACAPPA: That's correct. It's not broken down
6 by channel, for example.

7 THE COURT: Well, why is revenue -- I mean, obviously
8 profit is going to be less than revenue.

9 MR. CARACAPPA: Yes.

10 THE COURT: Why aren't they entitled to get some
11 sense as to what has been the profit for each copyrighted work
12 as opposed to merely just the revenue?

13 MR. CARACAPPA: It's my understanding that the client
14 doesn't do that by song. The client doesn't -- the client is a
15 business, it has profits and it has losses. The revenue
16 generated by the songs go to its bottom line. But by song, it
17 doesn't know how much profit or loss it has. Obviously, the
18 songs that generate more income are more profitable for them.

19 And our issue was that the way the request is drafted
20 and what they're asking for in the motion is far broader than
21 anything that they're going to need to actually prepare an
22 actual damages analysis.

23 The revenue per channel, the units underlying the
24 revenue per channel, the metrics used, again all of that
25 information we don't think they need to perform an actual

1 damages analysis. We think that what we provided is more than
2 enough. And they haven't been able to explain how this
3 additional information, that level of granularity, is going to
4 inform their expert or a jury.

5 With respect to the information they ask for on
6 page 4, it's the financial data related to the overall
7 business, annual revenues, costs, expenses, incremental
8 profits, that's not even asked for in any of their document
9 requests or interrogatories.

10 THE COURT: Let me -- 106, 107, and 108, are they in
11 the second --

12 MR. CARACAPPA: They are Exhibit A to Cox's --

13 THE COURT: All right, I've got it.

14 MR. CARACAPPA: I'm sorry, they are Exhibit A to our
15 opposition.

16 THE COURT: Well, 106, all documents evidencing your
17 loss of revenues and profits as a result of the infringements.

18 That would indicate one would have to produce
19 documents relating to revenue and profits, right?

20 MR. CARACAPPA: The problem is: As the result of the
21 infringements. And that's the issue that we have with the
22 request and that's the issue that we've been talking about.
23 Which is, you can't prove a but for, but for this one download
24 we would have lost income related to the album sales, or
25 digital downloads, or streaming, or licensing.

1 MR. BUCKLEY: Your Honor, can I make one point?

2 THE COURT: Okay. Thank you.

3 MR. BUCKLEY: That may all be true, and that's our
4 problem and our expert's problem. Plaintiffs don't have to
5 calculate any of this. When our expert does his analysis, if
6 plaintiffs think there are issues with it, or that it's flawed,
7 or that if it's not relevant, they are obviously free to argue
8 that.

9 And it is not their burden to prove actual damages.
10 They are proceeding on a statutory damages theory and are
11 entitled to do that.

12 We, however -- and I really don't think the law is
13 ambiguous on this. There are two Eastern District cases right
14 on point. We have a right to prove actual damages and to
15 introduce that as part of the statutory damages analysis.
16 There is zero question that we can't do it with what we've been
17 provided. I mean, Mr. Caracappa doesn't even dispute that. We
18 can't do it with revenue figures.

19 So we have to have some additional detail. And the
20 question is just what additional detail. And we've identified
21 pretty specifically what our expert needs. It should not be --
22 and again, I don't want to, I don't want to be glib about the
23 burden here, but this is a very significant case with
24 significant damages involved, going and collecting this
25 information and providing it in the scope of all of the

1 discovery that's occurred in this case should not be relatively
2 that burdensome.

3 THE COURT: I mean, I read in -- I can't remember
4 which one of the two cases that I read that you've cited, I
5 think it was the Dae Han Video Production one that I pulled up
6 and read, the older one, it talks -- and my recollection of
7 that case, and it was yesterday evening, was not that you prove
8 what actual damages are, but it has to be some overall general
9 relationship or some ballpark figure dealing with actual
10 damages. Not that you are going to be coming in and proving
11 what actual damages are, or that you're entitled to do that, or
12 that that's necessary.

13 Am I -- did I --

14 MR. BUCKLEY: Well, what the cases say, Your Honor,
15 is that when you're considering statutory damages, you
16 actually -- one of the two Eastern District cases actually says
17 you start with actual damages.

18 So I don't think there is any dispute about that. So
19 then the question is just, how do you calculate actual damages?
20 And again, that's not plaintiffs' problem or Your Honor's
21 problem, we have to figure that out. Cox has to figure it out.
22 And we have hired an expert to do that.

23 But in order to compare actual damages to statutory
24 damages, somebody has to calculate actual damages, and we're
25 going to take on the burden of doing that, but we need the data

1 to do it.

2 THE COURT: By copyright you plan to do that?

3 MR. BUCKLEY: We will try. And they have a financial
4 expert who will look at what our expert does and I'm sure try
5 to poke holes in it. And they will claim that his methodology
6 is flawed, and we will have an argument about that, but we're
7 entitled under the law to give it a try. And the case law says
8 that when it comes time to actually consider damages, the Court
9 needs to take actual damages into account. So somebody has to
10 try.

11 THE COURT: What information does the plaintiff
12 actually have that relates to the damages calculation? On a
13 per channel basis and then about -- you know, I assume you
14 don't keep documents as to each revenue minus operating income
15 and things like that for each copyrighted work?

16 MR. CARACAPPA: That's right, we don't.

17 THE COURT: How is it that the records are kept or
18 the books kept for each of the two plaintiffs here?

19 MR. CARACAPPA: Let me rephrase the question
20 slightly.

21 THE COURT: Okay.

22 MR. CARACAPPA: I'm not exactly sure how the records
23 --

24 THE COURT: It was probably poorly phrased, and I
25 understand. No, I --

1 MR. CARACAPPA: I'm not exactly sure how the records
2 are kept, but what they can do is they can break the copyrights
3 down by channel. So they can do physical album sales, digital
4 downloads, streaming royalties, and licensing royalties. And
5 they can do that, it's my understanding, per copyright by year
6 for both BMG and Round Hill.

7 THE COURT: Okay. So that's revenue?

8 MR. CARACAPPA: That is revenue --

9 THE COURT: Revenue for each copyright?

10 MR. CARACAPPA: Yes.

11 THE COURT: Okay. Are there -- and I take it the
12 portfolio for the overall revenue for each of these entities
13 comes from many more copyrights than just those that are
14 involved in this lawsuit?

15 MR. CARACAPPA: Yes, Your Honor.

16 THE COURT: But if you knew the percentage of what
17 this revenue is and the overall revenue, and you wanted to
18 ballpark something, you could just assign -- if it's 20 percent
19 here, 20 percent of the operating expenses, to come up with
20 what ballpark would be, the actual profits per -- all right.

21 Do they keep -- I take it they would have to keep
22 operating -- do an overall business level sheet of revenues,
23 operating expenses, and profit, is that right?

24 MR. CARACAPPA: Yes, Your Honor, they do have that
25 information generally with respect to the company --

1 THE COURT: Company, all right.

2 MR. CARACAPPA: -- not with respect to individual
3 copyrights.

4 THE COURT: All right. What I'm going to do -- you
5 know, I tell you, if I have them produce all this information
6 and you decide I'm going to just ignore it, I'm going to award
7 costs for them to do this.

8 I mean, you're asking for it. I'm not going to have
9 them go off and do this fishing expedition to get you a bunch
10 of information and then you just sit back and laugh about it.

11 I mean, you've represented to the Court that you've
12 got an expert and that your expert is going to put in the time
13 and effort and money to coming up with an actual damages
14 calculation. And I'm not going to have them go off and do this
15 just because you think it might be relevant, and then you get
16 it and you decide, I don't want to use it. Okay. If you do
17 that, you're going to pay for it.

18 MR. BUCKLEY: I understand, Your Honor. And I commit
19 to you that that is absolutely not what this is about. We are
20 going to use the information. This is not a fishing
21 expedition. And we are certainly not going to just sit back
22 and laugh that we imposed a burden on the plaintiffs. That's
23 not what this is about.

24 THE COURT: All right. Well, I'm going to have them
25 produce the information on a per channel basis and overall

1 company profit/loss information, operating expenses.

2 So that hopefully once you get your portion of the
3 revenue from these copyrighted works during the time period,
4 you can look at the portion of the revenue from the entire
5 company and, you know, do -- your expert can come up with some
6 type of analysis as to, you know, what share of the operating
7 expenses and things and hopefully come up with some sort of a
8 ballpark as to what the profit would have been for that based
9 on the revenues per channel and overall revenue and profit from
10 the company.

11 All right. So that will take care of that motion to
12 compel.

13 The motion to seal, let's deal with that one next. I
14 don't really understand why any of the information that you're
15 asking to be filed under seal should be under seal.

16 You know, I went back and just -- if this case ends
17 up having a lot of material that you are going to try and file
18 under seal other than identifying information of subscribers,
19 at some point we're going to have to deal with that issue, but
20 the idea that ISP numbers are changed and information kept for
21 a certain period of time, what is commercially sensitive,
22 confidential, or whatever about that information that it
23 shouldn't be in the public record? Or that, you know, certain
24 records aren't kept after a certain period of time?

25 I went through -- and let me just -- I am going back

1 to my -- the only way that the Court can really make a
2 determination on a motion to seal is to know what's being
3 sealed or what's being requested to be sealed and what is being
4 filed in the public record. So the only way -- I mean, and
5 what I'm asking is that when you file something under seal or
6 do that, I need to get also a paper copy of the redacted
7 version, not just a paper copy of what's filed under seal, so
8 that I can easily go back and, you know, just flip through and
9 compare the two.

10 I did it on online, I pulled the pleading up and saw
11 that of the materials that you all had, there are two pages in
12 which I understand that you've made redactions, pages 6 and 7.
13 And then I think, if I looked at it correctly, that you were
14 trying to seal Exhibits E, F, and G.

15 So let's just look at the plaintiffs' response to
16 defendants' motion for instructions, page 6, the first
17 paragraph that appears I believe is one that was redacted from
18 the public version. And I think part of this is because the
19 deposition transcript may have been designated confidential.

20 And I guess this is really Cox's responsibility to
21 explain to me why that information shouldn't be in the public
22 record, the information that's in the first full paragraph on
23 page 6.

24 MR. CARACAPPA: Why we designated it, Your Honor was
25 exactly correct, it's because the deposition --

1 THE COURT: Deposition --

2 MR. CARACAPPA: Transcripts were designated
3 confidential. We felt it was Cox's confidential information
4 that we were doing our best to protect when we filed the
5 motion.

6 MR. BUCKLEY: And we appreciate that. We appreciate
7 them trying to be sensitive about that. This particular
8 paragraph does not need to be redacted.

9 THE COURT: Okay. All right. Turning to page 7.
10 The last sentence in the carry-over paragraph I believe was
11 redacted in the public version -- in the public version. And
12 again, I assume that was based on -- that's part of the --

13 MR. BUCKLEY: Your Honor, the last sentence of the
14 last full paragraph on the page?

15 THE COURT: Yes. Starts off with: Not.

16 MR. BUCKLEY: That does not need to be redacted.

17 THE COURT: All right. And then the next paragraph
18 where it says -- I believe the redaction starts on the second
19 line: And. Then it's redacted for five words. So the
20 redaction goes from: And. And then the public version starts
21 back at: For the 2.5 million Cox customers.

22 MR. BUCKLEY: Your Honor, that also does not need to
23 be redacted. I feel compelled to add, we don't agree with
24 these statements, but they don't --

25 THE COURT: No, I understand that. I'm not asking

1 that -- you know, part of this is to make sure that the record
2 is as it should be in the public domain.

3 Exhibit D -- I'm sorry, Exhibit E. Yeah, Exhibit E,
4 which is the -- a portion of the deposition transcript of Mr.
5 Beck and a portion of the deposition transcript of Mr. Sikes.
6 And I'm only dealing with the single page as to both, and not
7 indicating that any of the other matters may not have
8 confidential information that should be under seal if it ever
9 does get filed.

10 But I am just curious as to whether there is anything
11 in --

12 MR. BUCKLEY: Your Honor, I don't believe that the
13 transcript excerpts in Exhibit E need to be sealed.

14 THE COURT: Then Exhibit F.

15 MR. CARACAPPA: Your Honor, I think that's our notice
16 letter. We don't need that to be sealed.

17 THE COURT: Okay. Then Exhibit G, this appears to be
18 e-mails back and forth between Cox and DigitalRights. I mean,
19 is that --

20 MR. CARACAPPA: I don't think either party requests
21 that the Court seal that.

22 THE COURT: I'm pretty sure it was filed under seal
23 though.

24 MR. CARACAPPA: It was, and it was mainly -- it was
25 mainly because --

1 THE COURT: It's marked confidential.

2 MR. CARACAPPA: It was marked confidential, exactly.

3 THE COURT: All right. Well, I'm going to go
4 ahead -- and I appreciate people marking things confidential
5 and being sensitive to that, but I think under the
6 circumstances none of the information that was filed in this
7 response necessarily meets the standard of filing under seal.

8 So I'm going to ask you to refile the document in the
9 public record.

10 MR. CARACAPPA: Yes, Your Honor.

11 THE COURT: So take out the --

12 MR. CARACAPPA: And we apologize for not providing
13 the Court with a comparison that we --

14 THE COURT: No, believe me, you're not the only one
15 who doesn't do it. It just makes my life a lot easier when
16 it's done. And hopefully we're not going to be having a lot of
17 sealed information. But I'm just telling you that if we do end
18 up doing that, it is much easier to have everything that gets
19 filed, the public version and the sealed version, a copy of it
20 to look at.

21 MR. CARACAPPA: Understood, thank you.

22 THE COURT: All right. So now, you know, I made a
23 problem, and I admit it, it was part of my fault, is what we
24 did when we were here before. And part of it, honestly, I had
25 no sense as to how many of these IP addresses may have been

1 changed or how frequently they got changed.

2 I mean, my limited experience in this has been that
3 those are pretty consistent for people who have service, that
4 they keep the IP addresses. And apparently there has been a
5 lot of transition going on, either customers coming in, going
6 out, or the IP addresses get changed a lot.

7 The thing that concerned me the most in the, you
8 know, back and forth on this was what efforts can we take to
9 identify who the subscriber was during the stated time period
10 in which the alleged infringement took place?

11 I mean, I know -- is that something that Cox is able
12 to do or not able to do? I mean, there was, you know, some
13 back and forth about, you know, now we're all worried because
14 there have been 100 and some that can't be identified.

15 And what are you able to do and what have you done in
16 that regard so far?

17 MR. BUCKLEY: So Cox spent a lot of time actually
18 trying to make that determination and was able, was able to
19 connect the IP addresses to a historical subscriber during the
20 relevant historical period for 139 of the 250 IP addresses.

21 And the way they were able to do that was by going
22 back to this CAT system, which is the system that they used to
23 take in potential abuse complaints and forward them on to
24 subscribers. And they were able to go back through their
25 records and match IP addresses with subscribers.

1 They were not able to do that for 111 of the 250 just
2 based on there not being records there that make that
3 connection. And we really have run down every option that we
4 can think of to try to do that, and we're not able to do it for
5 the 111.

6 THE COURT: Well, the information that you provided
7 for the IP addresses, the 250, that was information as to who
8 had the IP address at what point in time?

9 MR. BUCKLEY: So there are two -- there are two
10 categories. We were able to identify all of the current
11 subscribers, current as of the date of your order.

12 THE COURT: Right.

13 MR. BUCKLEY: With the exception of one IP address
14 that wasn't assigned. But for the other 249 we knew who the
15 subscriber was at that point in time and we sent them notices.

16 Then for the same 250, we went back to the periods
17 that are listed in Exhibit 4 and did our best to identify who
18 those historical subscribers were.

19 THE COURT: And those were the 139?

20 MR. BUCKLEY: And that's the 139, right. So we've
21 produced PII for 338 people. So more than the 250 sampling
22 that we were originally looking at. 338 folks have now had
23 their PII disclosed.

24 THE COURT: Of the 250 that you identified that had
25 those IP addresses at the time the order was entered --

1 MR. BUCKLEY: Right.

2 THE COURT: -- or thereabouts, is there any way to
3 establish when that IP address was assigned to that particular
4 person or to that subscriber?

5 MR. BUCKLEY: I believe the answer to that is yes.
6 For the current subscribers, we would be able to determine when
7 that subscriber obtained that particular IP address.

8 THE COURT: So, I mean --

9 MR. BUCKLEY: We could provide that information. It
10 may not be very useful, again, because of the way these things
11 are assigned and how dynamic they really are.

12 THE COURT: Well, I mean, it may be useful and -- you
13 know, I'm not trying to run anybody's case for them, but if
14 Sally's name shows up as one of the 250, and she got that IP
15 address from Cox's records a month ago, and the infringement
16 that is showing up as being a problem was five months ago, they
17 may not necessarily decide to spend the time and effort to go
18 talk to Sally.

19 I mean, they want to try and get, I assume, to the
20 extent that they feel like it's necessary to go one more level
21 down, to talk to the subscriber who actually had that IP
22 address at the time of the alleged downloads, right?

23 So just -- and I'm not -- I know you're not the
24 technical person behind all this, how dynamic are these IP
25 addresses? I mean, what is the general rule or how is it

1 generally followed? Does it vary from region to region? Is it
2 something that Cox normally does that, you know, they assign
3 new IP addresses every three weeks, six weeks, a month,
4 whatever?

5 Is there a standard that gets applied here?

6 MR. BUCKLEY: I can speak to it generally. And there
7 are some standards, and it does vary a bit by region at a top
8 level as to how IP addresses get assigned, but the dynamic
9 piece of it and the fact that they turn over frequently, it
10 relates to this.

11 So the lease for an IP address lasts for 24 hours.
12 It is continually updated. Which means the person maintains
13 their IP address unless something intervenes to cut off that
14 lease. But there are a number of different things that can
15 cause that, including if somebody shuts their router off and
16 turns it back on, something is wrong -- and, you know, you've
17 probably done this. Something is wrong with the router, so you
18 turn it off. When you turn it back on, you're going to get a
19 new IP address. If there is a power outage, you're going to
20 get a new IP address.

21 So it is absolutely true that some people keep their
22 routers on and their computers on and they maintain their IP
23 address for months at a time. It is more common, however, that
24 those IP addresses do turn over and they don't typically last
25 months at a time.

1 So here, for example, of the 139 historical folks we
2 were able to identify and the 250 current folks, there are only
3 29 people who had their IP address at the historical period and
4 still have it today.

5 So if that helps you. In that six-month period,
6 there was 80 percent turnover. I'm probably wrong on that
7 percentage, I'm trying to do it off the top, but something in
8 that range.

9 THE COURT: Okay. All right. Well, the issue, you
10 know, and it isn't part of what this motion is, but what
11 records are kept and how they were kept for the IP addresses is
12 something that at some point probably is going to end up having
13 to get addressed. Because, you know -- but as of now, you've
14 been able to identify 139 of the 250 by the time period in
15 which the alleged downloads took place, is that right?

16 MR. BUCKLEY: That's right, attached to the time
17 periods identified in Plaintiff's Exhibit 4.

18 THE COURT: 4?

19 MR. BUCKLEY: Right.

20 THE COURT: All right. There were a number of people
21 who communicated with Cox who haven't filed something with the
22 court.

23 MR. BUCKLEY: Correct.

24 THE COURT: I think -- and I'll hear from you, but my
25 sense is merely communicating to you and not doing something

1 with the court isn't sufficient for you to withhold any
2 information.

3 Having filed something with the court, whether it's
4 in a timely manner or not, I think I have to deal with that
5 issue. And that my sense is that of those -- and there have
6 been several batches of ones that have come in. And the person
7 who provided no identifying information, you know, I can't say
8 that you can't produce any information because this one could
9 be one of many.

10 MR. BUCKLEY: Understood.

11 THE COURT: So I think he or she has waived their
12 right to be able to have any information protected because they
13 didn't provide me with enough information to deal with the
14 situation.

15 So, overall, I think the idea -- and I can't remember
16 the exact breakdown, but there were a number of people who have
17 communicated to you who did not submit something to the Court.

18 MR. BUCKLEY: That's right, Your Honor. It's roughly
19 35.

20 THE COURT: Okay. I think you need to go ahead and
21 provide that information, and I'll order that you do that.
22 I'll put in an order saying that of those that did that, the
23 Court is hereby ordering you to provide that information.
24 Okay?

25 The ones that have submitted something to me, let's

1 talk about a process for me to make a determination on those.
2 And I want to hear from each side.

3 I mean, some of these people -- you know, I don't
4 know whether they -- an unusual group of people who have
5 submitted correspondence. And it's always entertaining to see
6 the arguments some people make or the things that some people
7 say.

8 I mean, what I ended up doing, as you can probably
9 tell by the filing, was going through and doing my best to
10 redact anything that was of a personal identifying information
11 as to each of those, but still keeping the IP addresses to the
12 extent that we were able to correlate those without the names
13 and addresses and other information.

14 I mean, I suspect I will need to do some type of an
15 order that addresses those. And I just want to hear what Cox's
16 position is on that and what the plaintiffs' position is on
17 whether that information should be disclosed or not or any
18 further information as to those.

19 Do you have that number?

20 MR. BUCKLEY: There were 49 individuals who contacted
21 Cox.

22 THE COURT: Cox.

23 MR. BUCKLEY: And for whom we withheld PII on that
24 basis. I believe that there are 14 individuals who have filed
25 something with the court.

1 THE COURT: Okay. All right. Of which --

2 MR. BUCKLEY: So for the remaining --

3 THE COURT: -- 13 we can have some sort of
4 identifying information. I think we've got the IP addresses
5 for probably 13 of those 14.

6 MR. BUCKLEY: I believe that's correct.

7 THE COURT: Okay.

8 MR. BUCKLEY: And I understood Your Honor to say that
9 you are going to enter an order for the remaining 35, that we
10 need to produce that PII?

11 THE COURT: Right.

12 MR. BUCKLEY: Which we'll do. So then the question,
13 I believe, is what do we do with respect to the 13 individuals
14 who have filed something and identified their IP address. And
15 I am happy to speak to that from Cox's position if you would
16 like.

17 THE COURT: Okay, thank you. I will hear from you
18 first.

19 MR. BUCKLEY: So I'm not going to reargue the motion
20 to compel, obviously. It's Cox's position that we shouldn't
21 have been required to provide any subscriber PII. I understand
22 that that ship has sailed.

23 But, Your Honor, the original order was, and the
24 representation from the plaintiffs was, we don't need this
25 information to prove direct infringement. And I think at least

1 in part based on that Your Honor said, okay, so this is
2 intended to be a sampling so we can see how our IP addresses,
3 how do they turn over, who are these folks.

4 So they have now got a sampling, 338 individuals,
5 which is more than the 250 you originally identified. And you
6 have got 14 people who took the time to send something to the
7 court and expressed what are to them at least legitimate
8 concerns about their individual or personal information being
9 disclosed.

10 I would submit that the proper approach here is to
11 not produce those folks' PII. They have the sampling they
12 need, a broader sampling than Your Honor originally thought was
13 appropriate. I would say for those 14, we should be ordered to
14 keep their PII protected.

15 THE COURT: Okay.

16 MR. CARACAPPA: So maybe I can go a little out of
17 order when compared to what I was going to do and address the
18 14 people first.

19 THE COURT: Okay.

20 MR. CARACAPPA: Because I think we may be able to
21 resolve this issue. It appears that of the 14, four do not
22 have IP addresses. Which leaves 10. And of those 10, two of
23 them, Doe number 9 and number 17 from Exhibit 14 -- I can
24 provide the Court with more information if that is helpful on
25 that subscriber. But two of those 10 are both current and

1 historical. So they would be relevant to the Court's order.

2 The other eight are not what was called for by the
3 Court's order and are current subscribers who may or may not
4 have that IP address and who -- well, who apparently do have
5 that IP address, but may or may not be downloading the
6 copyrights at issue.

7 THE COURT: Who may not have had the IP address at
8 the date identified in the exhibit?

9 MR. CARACAPPA: Exactly.

10 THE COURT: Okay.

11 MR. CARACAPPA: So what I would like to do is take a
12 step back.

13 THE COURT: Okay --

14 MR. CARACAPPA: We don't think this problem was
15 created by the Court. We think it was created by Cox. We
16 think the order was crystal clear. And the order stated that
17 Cox had to produce the personal information for the 250
18 subscribers identified in the exhibit. And if the subscriber
19 filed something with the court by June 5, Cox could withhold
20 that information. If they didn't, Cox had to produce it.

21 Well, in the letter that Cox sent its subscribers,
22 and that's Exhibit A to Cox's motion, it's a standard 512(h)
23 letter. It's not a letter that was catered to the Court's
24 order. And there are three reasons why we think that. First,
25 it says in the first paragraph: Please be advised that on

1 May 15 a civil subpoena to produce documents was received. And
2 that's not true.

3 And then if you go to the third paragraph, it says:
4 In order to identify the defendants. We explained to Cox and
5 to this Court that we don't need this information to identify
6 the defendants. We need it to identify the direct infringers
7 on Cox's networks, but they're not defendants and they're not
8 going to be defendants.

9 And then Cox goes on to say: Unless we receive
10 notification from you of your intent to file objections. So
11 Cox is telling the subscriber, all you have to do is tell us
12 you intend to file the objection and we won't produce the
13 information.

14 So we think this is the letter that created all the
15 confusion and why the Court has received so many John Does, and
16 that there is a discrepancy between the number of documents the
17 Court has received and the number of calls that Cox has
18 received.

19 THE COURT: So what about Exhibit B, which is
20 different than Exhibit A?

21 MR. CARACAPPA: Hang on one second, Your Honor.

22 THE COURT: Sure. I mean, Exhibit A --

23 MR. CARACAPPA: Yes, Your Honor. It looks like one
24 was sent to the current holders of the IP addresses, and one
25 was sent to the historical holders of the IP addresses. And

1 both letters suffer from the same problems.

2 And what they've done by sending this letter is
3 they've tainted the well. Now none of these people want to
4 talk to us because they think that we're going to bring them
5 into the lawsuit.

6 So we didn't just want this information for
7 statistical purposes, to prove the changing of the IP
8 addresses. But we wanted the opportunity to talk to these
9 people and ask them, for example, why do you use Cox Internet?
10 Are you drawn to the Cox Internet service because you can
11 illegally download music?

12 Now none of these people want to talk to us because
13 it says that they're going to be defendants in the lawsuit. So
14 that's a problem we think Cox created.

15 Fast forward to the day that they were supposed to
16 provide the 250 -- the information related to the 250 IP
17 addresses. They didn't. They provided information with
18 respect to 122, less than half.

19 This other 250, while we appreciate it, we didn't ask
20 for it, it's not part of the Court's order. We submit the only
21 reason they did it was to artificially inflate the numbers so
22 they could come to the Court and argue, well, we produced
23 actually more than what the Court wanted. But we didn't give
24 them evidence that said the current subscribers of those
25 addresses is infringed.

1 So while the Court is correct, it has some relevance,
2 they're going to be used for different purposes.

3 So we now have less than half of this information.
4 We asked them on June 8 to explain why the information was
5 unavailable and to explain why they were withholding subscriber
6 information only if the subscriber contacted Cox. They didn't
7 respond.

8 We contacted them again on June 10, they didn't
9 respond. It was not until the 11th on a meet and confer where
10 we explained, you know, we have to have answers to this
11 information, otherwise we're going to file something with the
12 Court. During that conversation they said, we're going to move
13 for clarity.

14 So we figured, well, we could file two ships passing
15 in the night, or we can wait and oppose, and that's what we did
16 in our motion.

17 What we didn't know until yesterday was that they're
18 destroying this information. Now, we think that could create a
19 big problem. Cox brings up the fact that we said this
20 information isn't necessary to prove direct infringement. And
21 that's correct. We think what's relevant is the fact that
22 there is infringement occurring on the Cox network regardless
23 of who it is.

24 But what we argued during the hearing and what they
25 have shown that they are going to do in their expert report is

1 their expert is going to say, well, all of these people, these
2 150,000 people, they may be subscribers, but they may not be
3 doing the downloading. They may have, for example, what's
4 called open WiFi. And it may be the 97-year-old grandmother
5 has open WiFi and all the teenagers in the neighborhood are
6 congregating on her porch and illegally downloading
7 information.

8 And they're pointing to the empty chair and they're
9 saying, oh, they haven't proven that that's not open WiFi. And
10 at the same time they're destroying the information related to
11 the 95-year-old grandma.

12 So we think they should have been preserving this
13 information since they were on notice of this issue, which was
14 back in 2012. At a minimum, they were on notice that they
15 should have been preserving this information the day the
16 complaint was filed. And it's not clear from their reply
17 whether or not they have preserved that information or whether
18 or not they are continuing to destroy it.

19 My last point is we think that this is a pattern.
20 They've done this with the Rightscorp notices. We send them to
21 them, they delete them. And they say, well, now we don't have
22 notice. And now they're doing the same thing with respect to
23 the addresses on the Cox network.

24 So while we ask for certain relief in the brief, we
25 just found out for sure, I guess, as set forth in their motion

1 that they are in fact destroying or have destroyed this
2 information, and we do think additional briefing is warranted
3 in this case.

4 THE COURT: Well, I'm going to deal with the issue of
5 the pending things. And if you want to, you know, further
6 brief that issue, I think it does need further briefing before
7 I certainly make a decision on it and know what the situation
8 is.

9 MR. CARACAPPA: Okay, Your Honor. Thank you.

10 THE COURT: What have you done with the 139
11 subscribers that you now know who they were at the time period
12 in which the alleged downloads occurred?

13 MR. CARACAPPA: So I will answer that question if the
14 Court requires, but right now we submit it's work product. We
15 are in the process of contacting them.

16 I will say that --

17 THE COURT: All right. The issue, as you know -- I
18 don't want to have everybody in here arguing motions and I
19 spend a lot of time doing it to get 10, 15 more names if it's
20 not something that you think is really important to your case.

21 And, you know, you got 139. You will get a few more
22 maybe as a result of my ruling today. And I don't know whether
23 -- how that relates to historical versus, you know, the time
24 that the information was provided. But, you know, what -- so
25 you are making use of the ones that you currently have, I take

1 it?

2 MR. CARACAPPA: Yes.

3 THE COURT: And you do want more if available?

4 MR. CARACAPPA: Yes to the first part of the
5 question. Maybe what we can do, if it please the Court, is
6 I'll go back and I'll consult with my colleagues. And if we
7 need more, we can request that additional difference between
8 the 137 and the 250 that the Court ordered.

9 But, yes, we are using the information that has
10 already been produced to us.

11 THE COURT: Okay. All right. Okay. Well, this will
12 probably get done in phases just because I think I'll probably
13 enter an order today, hopefully, that deals with the other two
14 motions sort of in the fashion that we normally do.

15 Just for the sake of -- I then will probably try and
16 do a separate motion that deals only with the issue of who
17 contacted Cox and who hasn't filed something with the court,
18 and ordering that those who have not filed something with the
19 court and only contacted Cox, Cox is hereby ordered to do so.
20 Just to make it a clean order for you to have in case something
21 comes up and you need it.

22 I probably won't until sometime after today enter the
23 order that deals with the other people who have filed things
24 with the court and addressing what to do with those. I want to
25 go back and look at them one more time.

1 MR. BUCKLEY: Could I make one factual point on that
2 issue?

3 THE COURT: Okay.

4 MR. BUCKLEY: So even the folks whose letters don't
5 include an IP address, it's possible that we can identify those
6 people based on other things that are in the letter as folks
7 who talked to Cox.

8 So when Your Honor goes back and tries to decide how
9 to deal with all those folks, just the fact that there is not
10 an IP address in there doesn't necessarily mean we can't tell
11 you --

12 THE COURT: Right. No -- --

13 MR. BUCKLEY: -- who the person is.

14 THE COURT: Other than 1 --

15 MR. BUCKLEY: Who we don't -- and that one we don't
16 know.

17 THE COURT: Right. And I have no way of knowing that
18 one. Everyone else, there is information of a name, address,
19 or something that could probably provide -- that I could
20 probably allow that to be filed under seal so that only counsel
21 has access to it and that only you would have access to that if
22 I decide to allow it to be opened up.

23 So I think the ones that we don't necessarily have an
24 IP address, we have some identifying information as to name,
25 and you can probably run a subscriber history record or

1 something for those and pull up what may have been their IP
2 address at some point in time.

3 MR. CARACAPPA: Your Honor, one point of
4 clarification. We have filed a response to docket number 81.

5 THE COURT: Right.

6 MR. CARACAPPA: The responses to docket number 88,
7 85, and 90 are to due on Monday.

8 THE COURT: Let me just see what -- let me just get
9 my docket sheet out.

10 MR. CARACAPPA: I think that's the rest of the John
11 Does.

12 THE COURT: 81 was the one that we don't have any
13 identifying information on. 88 is the large package of letters
14 that I consolidated into a single exhibit. And then there was
15 -- what was the other docket number?

16 MR. CARACAPPA: 85.

17 THE COURT: 85.

18 MR. CARACAPPA: And 90.

19 THE COURT: Okay.

20 MR. CARACAPPA: And I think we do have the IP address
21 for docket number 81. The issue that exists with respect to
22 the John Doe at docket 81 is that it's current. It's not a
23 historical subscriber.

24 MR. BUCKLEY: And, Your Honor, there was confusion on
25 that point. We do not believe we know who John Doe in docket

1 81 is. Plaintiffs do seem to think they were able to connect
2 it to an IP address, and maybe we'll just need to talk about
3 how you guys got there because we can't figure it out.

4 MALE VOICE: It was listed in the order, for docket
5 81 -- 82, supposed to be an IP address for that docket 81.

6 MR. BUCKLEY: How is that possible?

7 MALE VOICE: It was issued by the Court.

8 MR. BUCKLEY: Yeah, we can talk about it.

9 THE COURT: All right.

10 MR. BUCKLEY: We, Cox, don't believe we can identify
11 the John Doe in docket 81.

12 THE COURT: Okay. Well, at least we'll be able to
13 take care of the ones that haven't filed something with the
14 Court immediately, and then I'll look at it and may -- if I
15 have issues and need some further information, I'll set up a
16 call for us to coordinate that. Okay?

17 MR. CARACAPPA: Thank you, Your Honor.

18 THE COURT: Thank you, counsel.

19 MR. BUCKLEY: Thank you, Your Honor.

20 NOTE: The hearing concluded at 12:14 p.m.

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C E R T I F I C A T E o f T R A N S C R I P T I O N

I hereby certify that the foregoing is a true and accurate transcript that was typed by me from the recording provided by the court. Any errors or omissions are due to the inability of the undersigned to hear or understand said recording.

Further, that I am neither counsel for, related to, nor employed by any of the parties to the above-styled action, and that I am not financially or otherwise interested in the outcome of the above-styled action.

/s/ Norman B. Linnell

Norman B. Linnell

Court Reporter - USDC/EDVA